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Book Review

MISTRIAL: AN INSIDE LOOK AT HOW THE CRIMINAL JUSTICE SYSTEM WORKS...AND SOMETIMES DOESN'T, by Mark Geragos and Pat Harris¹

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THE MEDIA CAN BE USED AS A POWERFUL TOOL for informing the public about developments in the law. Unfortunately, this power can be abused, particularly to the detriment of the constitutional rights of individuals on trial for criminal offences. Members of the 24-hour news cycle have learned that criminal law is of great intrigue to the general public, and any information related to it, irrespective of reliability, is good for ratings.

In *Mistrial: An Inside Look at How the Criminal Justice System Works... and Sometimes Doesn't*, prominent American (celebrity) criminal lawyers Mark Geragos and Pat Harris tell something of a cautionary tale, using their book as a platform to inform the public about the dangers of media involvement in criminal cases. The book is divided into nine chapters, each dealing with a different aspect of the criminal justice system, albeit with a great deal of thematic overlap. The authors alternate chapters and each often pipes up with italicized anecdotes in the other's chapters. It is clear that the authors are writing within the same intellectual space, creating a fluid narrative, but both establish their own distinctive voices throughout. The book presents a compelling argument that defence lawyers are too often vilified and that serious constitutional issues that arise in the criminal justice system, especially since the American media latched onto the O.J. Simpson trial, need to be brought to the public's attention.

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1. (New York: Penguin Group, 2013) 262 pages.

As former (and current) counsel to numerous established celebrities including Michael Jackson and criminal trial-created celebrities, such as Scott Peterson, Geragos and Harris are in particularly unique positions to deliver this message.

The first chapter discusses political issues and the media sensation that the authors describe rather provocatively as “angry blond white women.”² The authors clarify that they are not actually referring to people who are blond, white, or female, but rather they are referring, generally, to the group of media personalities (led by Nancy Grace and Ann Coulter) who conduct tabloid-style reporting of criminal justice. This serves as the backdrop for the rest of the book, with the authors frequently making tongue-in-cheek references to these types of media personalities and the phenomenon of sensationalizing criminal cases by reporting ‘facts’ in the loosest sense of the word. The development of this form of sensationalist media in the wake of the O.J. Simpson case is described as a promotional tool:

Crime did in fact pay, especially if you could televise it and sell commercials. The Simpson trial proved that people would not only watch the trial, but they would watch people who talked about the trial, and they would even watch the people who talked about the people who talked about the trial Cable news was looking for programming to fill up a twenty-four-hour cycle. ... It wasn't giving a bone to a starving dog; it was giving the dog a forty-eight-ounce porterhouse steak.³

Considerable evidence of the unethical behaviour of media personalities is provided through multiple examples of prominent American crime journalists lying and undermining the administration of justice through their mainstream journalism. Geragos and Harris depict the media as the antagonist of the criminal justice system, in contrast to the proposed protagonist role of the criminal defence lawyer, whom they portray as a champion for human rights. They paint a picture of a society in which the accused are guilty until proven innocent and tabloid-style journalists regularly pre-judge cases in the media to shock the public. Their theory of the negative influence of the media, particularly during jury trials, is evidenced throughout the book by their personal ‘war stories’ and direct observations of the media.

After warnings about the pervasive damage that the media can cause in the administration of justice, the protagonistic defence lawyer becomes the focal point of the book. In tackling very weighty ethical issues in criminal law, the authors do not shy away from speaking frankly, and if one thing is clear it is

2. Geragos & Harris, *supra* note 1 at 28.

3. *Ibid* at 27-28.

that they are absolutely unapologetic for proudly defending alleged criminals.⁴ Criminal defence counsel are often viewed as unethical mouthpieces for their clients who will do or say anything to ensure that a guilty man walks free—a myth that Geragos and Harris attempt to dispel.⁵ The authors go to great lengths to deconstruct many of the ubiquitous myths about the role and character of defence counsel. They acknowledge that many of these myths are perpetuated by the practices of some unethical defence lawyers who misrepresent the majority.

Much ink is spilled discussing the art of cross-examination and jurors' expectations for counsel to use it effectively. These expectations are based on what they have seen on television and in movies.⁶ Geragos and Harris caution against these expectations because, in a world of prosecutors who are rewarded based on conviction rates, they can effectively undermine the trial process through misrepresentation or misinterpretation of the facts. Moreover, the authors warn that defence counsel themselves can be fooled into employing strategies that are contrary to their clients' best interests, which lead to many lawyers fearing that they are not presenting the best possible case. These are complicated ethical and practical issues, and the authors clearly assert their own view that the administration of justice is the paramount consideration in a criminal trial. Coming from defence counsel who are widely viewed as 'celebrity' lawyers, this is a particularly effective message.

Notwithstanding the above view, Geragos and Harris 'dish the dirt' on their more prominent former clients, including Sarkis Soghanalian, Michael Jackson, Susan McDougal (who is married to Harris), and Scott Peterson.⁷ These stories are not used explicitly to sell their book and gain further notoriety. Rather, the anecdotes serve to further their overall cautionary message: to be wary of media-reported trial coverage. More than one of the stories provide a stark contrast to the well-known versions of the trials as covered by the media. Perhaps one of the most compelling take-away messages is conveyed through the behind-the-scenes description of the Peterson trial:⁸ The combination of irresponsible media reporting and prosecutors who are primarily concerned with securing convictions have the potential to greatly impair trial fairness. *Mistrial* is worth reading if for no other reason than to get a unique, and often unreported perspective, from behind the closed doors of the defence bar. Through this lens, the underbelly of the criminal justice system may be exposed.

4. *Ibid* at 39.

5. *Ibid* at 41.

6. *Ibid* at 49-50.

7. *Ibid* at 71-113.

8. *Ibid* at 102-13.

A critical assessment of the criminal justice system would not be complete without addressing state actors, including judges, prosecutors, and police officers. Geragos and Harris present views that are quite polarizing and blunt. The chapter titles are provocative, including “Prosecutors—Being a Prosecutor Means Never Having to Say You’re Sorry,”⁹ “Judges—At Least Get it Wrong for Both Sides,”¹⁰ and “Police Officers—to Preserve, Protect, and to Lie.”¹¹ The authors have an obvious axe to grind, and they embrace controversy in doing so. Their blatantly adversarial approach is also certainly a by-product of the American justice system they describe, which differs in some respects from its Canadian counterpart. A world of elected judges and prosecutors, televised court sessions, theatrical trials, and loose-lipped jurors seeking book deals is foreign to the Canadian justice system, which places an emphasis on procedural fairness to the accused.

Despite their scathing critiques of some state actors in the criminal justice system, the authors also commend many prosecutors, judges, and officers. In all cases, the ones they respect are those who are moral, fair, and fundamentally interested in justice being served, irrespective of whether a particular conviction is obtained or not. In a message that is particularly relevant to Canadians given the current political climate, the authors foreshadow the fallout from the ‘tough-on-crime’ approach.¹² They deconstruct the minimal rehabilitative potential of overcrowded prisons and the media-driven public perceptions that drive the politicized prosecution and judicial systems. It is clear that the authors want readers to be skeptical of the effectiveness of an electoral system for prosecutors and judges.

State actors are not the only targets—*Mistrial* truly ‘takes no prisoners.’ One of the authors’ bugbears is the use of civilian juries in criminal trials. With a combined fifty-plus years practising criminal law, Geragos and Harris have enough experience to know of what they speak. Their thesis is that juries are completely unpredictable, thus making jury trials particularly onerous for defence counsel. From jury selection to the trial itself, the authors challenge the received wisdom that we can interpret jurors’ psychological states or predict their predilections. Through many entertaining anecdotes (in which the authors themselves admit to being overconfident in assessing how jurors will approach cases) they attempt to dispel the notions that jury selection is a science and that jurors are easy to read. Their stories almost always reveal situations in which they were blind-sided by the juries’ ultimate decisions.

9. *Ibid* at 115.

10. *Ibid* at 145.

11. *Ibid* at 161.

12. *Ibid* at 131-35.

The frailties of the American system are best exemplified by a description of juror motivations and behaviours in the Scott Peterson murder trial. In this case, a juror was accused of threatening the jury foreman in order to secure a guilty verdict. This same juror was also overheard in a local bar discussing the other jurors and the evidence. Geragos and Harris note the manner in which the judge dealt with this situation following the jury foreman's complaint:

The judge's solution was to let the jury foreman go rather than kick the bully off the jury To no one's surprise, when the trial was completed, this troublesome juror was the principal one calling networks to do interviews and trying to get a book published. Unfortunately for him, he was not telegenic He did, however, collaborate with a number of the other jurors on a book about the case. We found it rather interesting that these jurors who claimed to be so upset by [the victim's] death were not upset enough to forego trying to make a buck off of her murder. Apparently empathy does not trump the desire for fifteen minutes of celebrity.¹³

The media's influence on the criminal trial process is a constant theme throughout the book. While jurors are particularly vulnerable to this influence, it can also undermine the presumption of innocence. While the stated purpose of *Mistrial* is to provide a balanced critique of the criminal justice system, more than anything it cautions readers about the infiltration of unreliable tabloid news into mainstream media.¹⁴ Geragos and Harris perhaps best summarize the propensity for people to lie or embellish by focusing on media personality Nancy Grace and her skewed account of her own tragic story:

She built her career on a tragic backstory of the murder of her boyfriend and how that led her to become a prosecutor and to stand up for victims of crime. Fair enough—a good story and an understandable reaction. But the actual story was not enough for Grace because it didn't allow her to fit in all her pet peeves So she made up a story that fit her agenda much better. In her retelling, her fiancé was murdered by a complete stranger who robbed him of \$35 and left him to die. The twenty-four-year-old murderer was arrested and turned out to have a lengthy criminal record, but he had been put back on the streets. He denied any involvement in the killing and never confessed. ... The convicted murderer then began a string of appeals that kept her wounds open. ... [In reality] the murderer was actually a co-worker of [the victim] ... not someone with a criminal history who had been let out by a liberal judge. ... [H]e did not deny his involvement but instead confessed on the night of his arrest. ... [T]he defendant was mildly retarded. ... The defendant did not file any appeals¹⁵

13. *Ibid* at 209-10.

14. *Ibid* at 220-26.

15. *Ibid* at 223-24.

While the authors frequently portray media personalities like Nancy Grace and her cohorts as pathological liars on a quest for ratings, they also show how defence counsel can get some value out of media personalities. This book serves as a guide to media management, with the authors providing anecdotal support for how to effectively and advantageously utilize the media when representing a client. They describe how to assess when it is useful to counter obviously absurd and damaging media reports and when it is best to stay silent. Coming from two of the most prominent defence counsel in California, the advice certainly has merit.

Geragos and Harris wrote *Mistrial* with a clear purpose: to highlight current problems with and misunderstandings about the criminal justice system in the United States. They conclude the book by providing ten succinct recommendations to the American Senate for reshaping and improving the system to ensure the ethical and fair administration of criminal justice.¹⁶ There are no surprises here, given the tenor of the book, but by bringing many cases to life, the authors also demonstrate a more serious motivation behind the book. *Mistrial* is not necessarily an academic endeavour. Very few statistics or empirical studies are provided. It is, however, an entertaining compilation of anecdotal evidence attesting to the noble nature of criminal defence work. And the authors do present some possible avenues to pursue for change. If serious consideration is given to their recommendations, the American and Canadian criminal justice systems could become more closely aligned, at least procedurally. It might provide some satisfaction to Canadians to know that our system could be the model that the United States system might emulate.

And yet, despite the authors' focus on the American criminal justice system, there are many aspects of media influence that may foreshadow problems we might expect to see in Canada. For anyone with knowledge of the post-*Charter of Rights and Freedoms* Canadian criminal justice system, *Mistrial* affirms some of the current concerns over it. The book is an effective cautionary tale for Canadians, with the media circus that the authors describe representing an almost dystopian version of what our own system could become. Although this book is entertaining literary fodder from these two prominent and charismatic defence counsel, it certainly raises a reasonable doubt about whether the American system adequately ensures the procedural rights of criminal accused. Stay tuned to see whether our system ends up in a similar state.

16. *Ibid* at 248-59.